UNITED STATES OF AMERICA	)	DEFENSE REPLY TO
	)	PROSECUTION RESPONSE TO **D17**
v.	)	(SUBJECT MATTER JURISDICTION)
	)	
SALIM AHMED HAMDAN	)	26 October 2004
	)	

1. Timeliness. This motion is being filed in a timely manner within the parameters established by the Presiding Officer on 24 August 2004 and the grant of relief by the Presiding Officer on 22 October 2004 to submit on 27 October 2004.

2. Relief Sought: That the Military Commission find that the sole charge against Mr. Hamdan is not within its subject matter jurisdiction as established by the Constitution of the United States, Federal Statutes, and international law and dismiss the charge against Mr. Hamdan.

3. Facts. The Defense objects to Prosecution facts "f - v" for the reasons set out in Defense response to P7 and on the grounds that these facts are irrelevant to the issue of whether the charge as stated states an offense under the laws of war.

a. Conduct alleged does not reference a period wherein the United States was either a participant in a declared war, and relies on alleged conduct prior to the United States engagement in armed hostilities in Afghanistan.

b. The sole allegation fails to allege that Mr. Hamdan was anything more than a minor actor.

c. The crime of conspiracy is the sole allegation.

4. Law and Discussion.

a. Congress Must Define Any Conduct Over Which a Military Commissions has Jurisdiction and it Has Not Defined Conspiracy as a Violation of the Laws of War

Section 821 of the UCMJ establishes the jurisdiction of military commissions over "offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. As to the first prong, Congress has only ensured by statute that two offenses are explicitly triable by commission. See 10 U.S.C. § 904 (aiding the enemy); 10 U.S.C. § 906 (spying). With respect to the law of war, the Constitution gives Congress alone the duty and power to "define and punish . . . offenses against the law of nations." U.S. Const. art. I, § 8, cl. 10; see also *Ex parte Quirin*, 317 U.S. 1, 30 (1942) ("Congress [has] the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts."). Accordingly, Congress has defined a "war

crime" as "any conduct" that is a "grave breach" of international law. 18 U.S.C. § 2441. The Executive's MCI No. 2 makes clear that its delineation of crimes is only meant to be "declarative of existing law." MCI No. 2 para. 3(B). Thus, "[n]either congressional action nor the military orders constituting the commission authorize[] it to place [Mr. Hamdan] on trial unless the charge preferred against him is of a violation of the law of war." *In re Yamashita*, 327 U.S. 1, 13 (1946).

It is of course true that the Executive may promulgate guidelines to govern the military commissions. But, contrary to the Government's argument, it is not a part of the Executive's power to "define . . . the various offenses against the law of war." Government Motion para. 6(a) (citing *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957)). Rather, "[t]he Constitution entrusts the ability to define and punish offenses against the law of nations to the Congress, not the Executive." *Padilla v. Rumsfeld*, 352 F.3d 695, 714 (2d Cir. 2003), *rev'd and remanded on other grounds*, 124 S. Ct. 2711 (2004).

In *Quirin*, the Court described the extent of the President's war powers: "The Constitution . . . invests the President as Commander in Chief with the power . . . *to carry into effect all laws passed by Congress* . . . defining and punishing offenses against the law of nations, including those which pertain to the conduct of war." 317 U.S. at 26 (emphasis added). The President's power cannot overstep its constitutional boundaries. In fact, *Quirin* explicitly took as an assumption that courts could police the presidential definition of offenses and that the President did not have the power to define as he wished:

> "there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, *either because they are not recognized by our courts as violations of the law of war* or because they are of that class of offenses constitutionally triable only by a jury."

Ex Parte Quirin, 317 U.S. 1, 29 (1942).

The Government points to *Quirin* and *Colepaugh v. Looney*, 235 F.2d 429 (10th Ci. 1956), as two examples where U.S. courts have permitted military commissions to convict defendants of conspiracy to violate international law.[1] But both of these cases are inapposite. It is true that in *Quirin*, the defendants were charged with conspiracy before a military commission. 317 U.S. at 23. But aside from mentioning the charge, the Court did not again refer to conspiracy. In fact, of the four charges against the defendants, the Court ruled on the adequacy of only the first charge (violation of the laws of war), and did not at any point find the conspiracy charge adequate. *Id.* at 46. *Quirin*'s silence hardly supports the Government's proposition that

[1] Nor is the government justified in its reliance on *Mudd v. Caldera*, 134 F. Supp.2d 138 (D.D.C. 2001) to support the proposition that "war crimes conspiracy convictions at military commissions did not commence with the Quirin decision." *See* Prosecution Response to Defense Motion To Dismiss at 8. In *Mudd*, the accused had been convicted of "of aiding and abetting as an accessory" to the assassination of President Lincoln for providing shelter, medicine and method of escape to John Wilkes Booth. *See* Mudd, 134 F. Supp.2d at 140. In short, there was no separate war crime of conspiracy at issue. And the charges and trial took place when Congress had specifically authorized trial by commission.

conspiracy is appropriately tried before military commissions. Rather, the plausible reading is that conspiracy was tethered to other offenses that were authorized to be tried by a commission.

Colepaugh is similarly silent with respect to conspiracy. A single sentence in the decision informs us that the defendant was faced with a conspiracy charge and conviction. But at no point did the court or the defendant engage with the question presented here—namely, whether conspiracy is an offense that can be tried by a military commission. 235 F.2d at 431. Rather, the case turned on whether the defendant's espionage activities counted as "unlawful belligerence"—a question as to which the court quickly disposed. *Id.* at 432.

In short, neither *Quirin* nor *Colepaugh* support the Government's arguments, except by their silence. Indeed, nothing in domestic law supports the type of conspiracy claim argued by the government here. Courts are clear that when someone is providing ordinary services to even a criminal enterprise, that cannot be the basis on which to impose conspiracy liability. As the classic treatment of the issue in American law by Judge Learned Hand states, background providers do not join the conspiracies to which they knowingly provide goods and services. United States v. Falcone, 109 F.2d 579 (2d Cir. 1940), aff'd 311 U.S. 215 (1940).[2]

The prosecution claims that Congress did not occupy the field in the War Crimes Acts of 1996 and 1997. But the Congress did define a long, tremendously long, list of war crimes in those two acts. See Opening Motion in D17. It defies common sense to think that they would have enumerated literally dozens of crimes without intending to occupy the field. The Prosecution contends that this would mean a perpetrator of the September 11 attacks would not be punished, which is absolutely wrong. Such an act would constitute murder, plain and simple.

b. The Military Tribunal Has No Jurisdiction To Try Mr. Hamdan Because the Government Has Not Offered Any Evidence Showing that Hamdan Conspired to Violate International Law After September 11.

The prosecution has offered no evidence showing that Mr. Hamdan conspired after what President Bush calls "the war" began on September 11. The acts of Mr. Hamdan before September 11, 2001, are irrelevant, under the very authority that the Prosecution so trumpets, the President. *See* Prosecution Response to Defense Motion To Dismiss at 3 (citing Public L. No. 107-40, 115 Stat. 224 (2001) ("The Congress, in passing the AUMF of 2001, expressly authorized the President to use 'all necessary and appropriate force' against 'nations, organizations, or **persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001**.') (emphasis added). The Government does not allege facts demonstrating that Mr. Hamdan had any role in the crimes of September 11, nor does it offer any evidence that Hamdan conspired to violate international law in the period between September 11 and his apprehension in Afghanistan and detention in Guantanamo. Conspiracy requires proof of an agreement, and there has been no proof of agreement either before or after September 11. As a result, because Military commissions can only try crimes

[2] The prosecution misleadingly claims at p. 8-9 that 18 U.S.C. 371 can be used to justify this prosecution. That is a civilian version of conspiracy inapplicable here for obvious reasons. And it is impossible to apply it in any context without some explanation of how the underlying act constitutes an offense against the United States.

once war has begun, the Prosecution has not charged Hamdan with any crime over which this court has subject matter jurisdiction.

Even more problematically, the prosecution contends that "it is irrelevant… whether a state of armed conflict exist at the time of the overt act." Prosecution Response to Defense Motion To Dismiss at 7. Beside the fact that the Government has not cited any reliable evidence that Mr. Hamdan committed an overt act to further the illegal goals of Al Qaeda, the jurisdiction the Government asserts is based upon its interpretation of the president's power to enforce the "laws of war." *See* Prosecution Response to Defense Motion To Dismiss at 3. Yet, to even reach the question of whether the Executive could charge Hamdan with a crime not authorized by Congress before a military commission, there must be a determination that the war giving rise to the "war powers" existed. That is, the Government cannot claim that the power to try alleged enemy combatants as an "important incident[s] of war" on one hand, but then turn around and proclaim that whether there was a war or not is irrelevant. *See* Prosecution Response to Defense Motion To Dismiss at 3 *quoting Hamdi v. Rumsfeld* 124 S. Ct. 2633 (2004) (plurality opinion). After all, *Quirin* rested its justification for allowing Congressionally authorized military commissions based on the need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). As a result, for the Government to claim that the Executive can use this argument to try individuals in military commissions for supposed acts committed before the armed conflict even began turns this rationale on its head.

c. International Law Does Not Import General Conspiracy Law and Offers No Support for the Government's Charge of Conspiracy against Mr. Hamdan

International Law does not recognize any conspiracy as an independent crime, and to the extent it considers conspiracy at all, it only contemplates it in the rare instances when high-level official are engaged in genocide or other crimes against humanity. The Government claims that "[t]he crime of conspiracy was clearly established in the Nuremberg Charter" and that this was "reflective of customary international law." Government Motion at para. 6(g). In truth, the Nuremberg Charter's invocation of conspiracy was heavily criticized because "the concept of conspiracy . . . had never before been recognized in continental Europe." Michael P. Scharf, *The International Trial of Slobodon Milosevic: Real Justice or Realpolitik?*, 8 ILSA J. Int'l & Comp. L. 389, 392 (2002). Furthermore, the Nuremberg Trial's anomalous use of conspiracy bears little resemblance to the conspiracy charge leveled against Mr. Hamdan. In part because of the criticism over the conspiracy charges, the Nuremberg court did not even treat the Charter's mention of "conspiracy" as referring to a crime separate from the underlying substantive offense. *See* Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 Minn. L. Rev. 30, 56-57 (2003); Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 Mil. L. Rev. 275, 281 (1995). Rather, as a commentator on Nuremberg explained, "even though the Charter provided that complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law, the tribunal considered this provision to be a theory of individual liability and not separate crimes." See Barrett & Little, *supra*, at 57; see also Amnesty International, The International Criminal Court: Making the Right Choices, pt. 1, VI(D) (1997) (explaining that because "the separate crime of conspiracy to commit acts of aggressive war was not defined in the Nuremberg Charter"

the Nuremberg tribunal construed conspiracy very narrowly). By contrast, the Government here seeks to try Mr. Hamdan under MCI No. 2's expansive definition of conspiracy, an offense of which Mr. Hamdan "may be criminally liable [as a] separate offense" "regardless of whether the substantive offense was completed." MCI No. 2 para. 6(C).

Nor do the subsequent developments cited by the Government establish that the current conspiracy charge derives from international law. It is true that conspiracy is included in certain international agreements after Nuremberg, such as the Genocide Convention of 1948. But the mere fact that conspiracy is criminalized in those certain narrow circumstances does not imply that a general crime of conspiracy attaches to *all* offenses under international law. After all, the Nuremberg judges themselves—the ostensible originators of the conspiracy charge that the Government applies today—were wary of the dangerous expansion of conspiracy liability and sought to limit such liability both in the Charter and in their rulings. Jonathan A. Bush, Book Review, *Nuremberg: The Modern Law of War and Its Limitations*, 93 Colum. L. Rev. 2022, 2077 (1993). And European civil-law nations—whose understanding of the term "conspiracy" guides the meaning of the term as it is used in international documents—would object to expanding conspiracy liability because they consider conspiracy to apply only narrowly "where its purpose is to commit certain crimes considered as extremely serious." Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 186 (Int'l Crim. Trib. for Rwanda Trial Chamber Jan. 27, 2000); see also Steven Powles, *Joint Criminal Enterprise*, 2 J. Int'l Crim. Just. 606, 613 (2004) ("Other than the fact that genocide is the most serious crime contained in the ICTY Statute, there is no logical reason why there should be additional modes of liability [including conspiracy] for genocide."); see also Barrett & Little, *supra*, at 57.

While conspiracy can be found in only a limited number of international treaties, it is strikingly missing in several important areas. In particular, the recently passed statute of the International Criminal Court (ICC) contains *no language* concerning conspiracy. This was not just an oversight: at various stages in the drafting process, the ICC statute contained specific conspiracy provisions, but disagreements caused those provisions to be excised. Barrett & Little, *supra*, at 80-81. Thus, as at Nuremberg, there is still no international consensus on a general conspiracy offense like the one charged here. Conspiracy is simply *not* a violation of the law of war today.

The Government cites several cases from the International Tribunals of Yugoslavia (ICTY) and Rwanda (ICTR) to bolster its case. However, the Government itself admits that these cases concern "joint criminal enterprise" liability and not conspiracy liability. Government Motion at para. 6(g). The difference is that conspiracy is "a free-standing crime"; by contrast, joint criminal enterprise liability "attaches to substantive offenses," Barrett & Little, *supra*, at 43, so that a defendant guilty of joint criminal enterprise is in fact found liable "for the ultimate substantive offenses because of sharing a common criminal purpose with others in the enterprise." Government Motion at para. 6(g). The ICTY has expressly distinguished these two types of liability, holding that "while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise." Prosecutor v. Milutinovic, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, IT-99-37-AR72, para. 23 (ICTY Appeals Chamber, May 21, 2003); see also *id.* para. 26 ("Criminal liability pursuant to

joint criminal enterprise is not liability . . . for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise.").[3]

These decisions therefore patently do not support the Government's claim that *its* conspiracy charge stems from settled international law. The Government cavalierly justifies its reliance on these cases by arguing that "[f]rom a practical perspective this is a matter of little import." *Id.* However, it is well established that a jurisdictional defect cannot be cured by a party's claim of harmless error. Cf. United States v. Prentiss, 206 F.3d 960, 975 (10th Cir. 2000) (An indictment's failure to allege a federal crime "is a fundamental jurisdictional defect that is not subject to harmless error."). Therefore, the ICTY and ICTR decisions cannot support the Government's claim that its conspiracy charge is founded in international law. And of course the import is huge – since the elements of the two offenses are entirely different.

The Prosecution claims that the *Prosecutor v. Musema*, Case No. ICTR-96-13-T, (ICTR Trial Chamber I, January 27, 2000) and Professor Cassese support their view of conspiracy. This is not true. Neither shows that a prosecution has ever been used, in practice, for an inchoate offense, and certainly not against a low-level individual. *Musema*, in any event, dealt with an instance of conspiracy that is limited to a particular setting, namely genocide. *Id.* para. 194. And its conclusion that conspiracy to commit genocide is a separate offense stems from its reading of the legislative history of the Genocide Convention, not its reading of customary international law. *Id.* para. 187. Finally, while *Musema* ostensibly adopted the "common law" definition of conspiracy, it nevertheless tempered that definition to preclude convicting a defendant of *both* conspiracy *and* the underlying substantive offense. *Id.* para. 197-98.

Given these considerations, the Government's repeated reliance on Prosecutor v. Tadic to support several propositions essential to its case is especially inappropriate. *See* Prosecution Response to Defense Motion To Dismiss at 12-14 citing *Prosecutor v. Tadic*, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). While the Government attempts to cite the case for "discussing the war crimes conspiracy convictions in France, Great Britain, United States and other countries," the actual case relies solely on joint liability- a fact repeatedly emphasized by the court. *Id. at para. 196-220.* In fact, the court explicitly emphasizes that its decision is based on the view that "the common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a **joint criminal enterprise."** *Id. at para. 227* (emphasis added).

The word "conspiracy" appears only twice in the entire opinion, and those are both passing references having nothing to do with the propositions that the Government wants to cite *Tadic* for. *Id.* at para. 189 (merely listing parts of the Statute of the International Tribunal- "Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy, incitement*, *attempt* and *complicity*); *Id.* at 211 (describing one of the arguments of

[3] *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), cited by the Government, see Government Motion para. 6(g), confuses joint criminal enterprise liability with conspiracy liability. It is partially due to this confusion that it announces (mistakenly) that conspiracy is an offense in international law. See 244 F. Supp. 2d at 322-23.

defense counsel). As a result, the Government's attempt to use *Tadic* to support of its false contention that international law recognizes the crime of conspiracy and that it does so in a broad manner is severely misplaced. *Tadic* is merely one international tribunal's explanation of the "joint criminal enterprise" offense, which is not at issue in this case. Moreover, by spelling out the three different bases for joint criminal enterprise in *Tadic* and then explaining how, in his opinion, Hamdan falls under the most expansive basis for joint criminal enterprise from Tadic, the Prosecutor attempts to obfuscate the fact that Mr. Hamdan is charged with conspiracy rather than joint criminal enterprise.[4] And they certainly do not extend conspiracy to low-level individuals.

After all, in the very rare cases where international law recognizes conspiracy as an offense, conspiracy does not apply to minor actors. Where international law has recognized a limited conspiracy offense, it has limited it to major actors engaged in a common criminal enterprise. This trend began with the Nuremberg Tribunal, which decided early that "conspiracy liability must rest on *high-level*, *active* involvement." Bush, *supra*, 93 Colum. L. Rev. 2022, 2077 (emphasis added). It continued in European civil-law countries, which limit conspiracy liability to "serious crimes." Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 186 (Int'l Crim. Trib. for Rwanda Trial Chamber Jan. 27, 2000).

International law does not support the Prosecution's contention that considerations therefore patently do not support the Government's claim that *its* conspiracy charge stems from settled international law. Moreover, even its chief source, Richard P. Barrett and Laura E. Little *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, an article whose aim is to expand the use of conspiracy law in the international context, admits "the somewhat ambiguous" nature of international law's recognition of conspiracy, and acknowledges the heretofore limitation of conspiracy convictions to those engaged in genocide. *Id*. at 38-39, 56 ("the word [conspiracy in the ICTY] may simply be an artifact of its earlier use in the Genocide Convention").

Prosecutor v. Kvocka, Case No: IT-98-30/1, Judgment 2 November 2001, does not support the Government's contention that minor actors can be charged with conspiracy. The tribunal was careful to emphasize that liability for a *joint criminal enterprise* (a very different type of offense)[5] depended upon an actor's *substantial* involvement:

> [A]n accused must have carried out acts that *substantially* assisted or *significantly* effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise.

[4] That is not to say that the evidence against Mr. Hamdan would qualify even under intent to take part in the "criminal purposes of that enterprise" standard. The Government has not alleged any reliable facts that would justify a finding that Hamdan, a mere driver for Al Qaeda, intended to engage in the criminal purpose of the organization.

[5] We reiterate that these decisions simply do not deal with the kind of conspiracy charge that the Government is invoking today; rather, they deal with joint criminal enterprise liability or accomplice liability, which attaches to the underlying substantive offense.

Id. para. 312 (emphasis added). In the paragraph after the accountant example cited by the Government, Government Motion para. 6(h), the tribunal gives an example of a mere participant in the joint criminal enterprise who would *not* be criminally liable:

> The man who merely cleans the office afterhours, however, and who sees the child photos and knows that the company is participating in criminal activity and who continues to clean the office, would not be considered a participant in the enterprise because his role is not deemed to be *sufficiently significant* in the enterprise.

Kvocka, supra, para. 286 (emphasis added). More specifically, the tribunal later notes:

> In general, participation would need to be assessed on a case by case basis, especially for low or mid level actors who do not physically perpetrate crimes. . . . In most situations, the aider or abettor or co-perpetrator would not be someone readily replaceable, such that any "body" could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents.

Id. para. 309.

Mr. Hamdan did not physically perpetrate any of the crimes committed by Al Qaeda or Usama Bin Laden. Nor was he irreplaceable: rather, he was simply a driver. As a result, *Kvocka* does not support the Government's contention that Mr. Hamdan can be charged with conspiracy liability.

One last point about *Kvocka:* we note that the Government significantly misquotes one of the factors enumerated by the Tribunal. The Government lists the sixth factor as "the seriousness and scope of the crimes committed," and notes that "the heinous crimes carried out are of an astronomical proportion." Government Motion para. 6(h). In fact, the tribunal writes: "Perhaps the most important factor to examine is *the role the accused played* vis-à-vis the seriousness and scope of the crimes committed." *Kvocka, supra*, para. 311 (emphasis added). Therefore, a proper analysis centers not on the seriousness of the crimes, but rather on *Mr. Hamdan's specific role* in contributing to the seriousness of the crimes.

d) *The Government's Erroneous Reliance on Undersigned Civilian Counsel's Academic Work Further Illustrates the Inappropriate Nature of Applying Conspiracy Law to Mr. Hamdan*

The Prosecution has attempted to introduce undersigned civilian defense counsel's academic articles on conspiracy doctrine into these proceedings and asserts that those Articles support the charge here, but has selectively and misleadingly quoted from those Articles. Prosecution Response, at 3, 14 (quoting Neal Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003, at 44). Here is the conclusion of the Article that they cite:

> It's still possible that conspiracy charges, like many other aspects of criminal law, can be used by powerful prosecutors to harm small fish unfairly. But that's a larger, systemic problem that we should deal with by paying enough for public defenders, giving defense attorneys broad latitude to cross-examine

cooperating witnesses and iron-clad access to inculpatory and exculpatory evidence, and making sure that juries get cautionary instructions to guard against lying by cooperating witnesses. If it turns out that prosecutors can't be trusted with the discretion that conspiracy doctrine gives them, then the dangers posed by unscrupulous prosecutors are even higher than we think.

At the same time, the virtues of the conspiracy doctrine go only so far. The permissive rules make sense in the context of a system with strong constitutional protections for defendants, including the right to counsel, trial by jury, indictment by a grand jury, cross-examination of witnesses, and pretrial access to the prosecution's evidence.

In the wake of September 11, however, the federal government apparently wants to use conspiracy law to detain terrorism suspects indefinitely. Some of these suspects may even be tried for conspiracy in front of military tribunals that offer few of the protections federal and state courts do. The wide latitude that conspiracy doctrine gives prosecutors *only works* when defense lawyers have the power to probe the government's claims. *If conspiracy law is transplanted to a military setting that lacks these procedural rules, America's commitment to justice, as well as truth, will be tainted.*

Katyal, at 48. See also Neal Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1392-94 (2003); Neal Katyal, Gitmo Better Blues, Mar. 19, 2004, Slate Magazine, available at http://slate.msn.com/id/2097397/:

There are good reasons why the laws of war, unlike American civilian law, place powerful limits on the conspiracy doctrine. Recall that the civilian offense is based largely on a theory of deterrence—that draconian punishments will scare people into avoiding association with criminal organizations. But these arguments fail with respect to the military proceedings at Guantanamo. For one thing, the idea that other would-be war criminals are watching the proceedings at Guantanamo and modifying their conduct is far-fetched, … For another, deterrence works best when the perceived costs of the action exceed the perceived benefits, and it is very difficult to make a claim that the speculative risk of punishment in U.S. military courts would change the calculus of future war criminals (particularly when military operations against them are already ongoing). This isn't to say that there is no upside to conspiracy charges, only that the benefits are more attenuated than they are in ordinary criminal cases and eroded by serious risks of error. And if there are cases in which the advantages of a conspiracy charge become apparent, then the administration is free to use the civilian offense of conspiracy—one written into law by Congress instead of drafted by a Pentagon bureaucrat—in a standard criminal action.

…American criminal law has been able to develop a vibrant offense of conspiracy only because of its strong commitment to criminal procedural guarantees. So, while charges can be somewhat vaguer in a civilian conspiracy trial and hearsay evidence may be admitted, the standard checks on prosecutorial and judicial abuse

> exist—indictment by a grand jury, the right to a jury trial, the right to confront witnesses, the right to obtain exculpatory evidence, and so on. Those of us who defend a broad substantive offense of conspiracy treat these procedural rights as preconditions before such a wide-ranging offense could be established. Yet the military tribunals offer no such guarantees….The administration thus gives birth to a legal Frankenstein. …The chief criticism of the tribunals has always been that the president cannot have the unilateral power to define offenses, pick prosecutors, select judges, authorize charges, select defendants, and then strip the civilian courts of all powers to review tribunal decisions. This principle goes all the way back to the Declaration of Independence, which listed, among the founders' complaints against King George, that he "has affected to render the Military independent of and superior to the Civil Power"; "depriv[ed] us, in many Cases, of the benefits of trial by jury"; "made Judges dependent on his Will alone"; and "transport[ed] us beyond Seas to be tried for pretended Offences." For these reasons, the Supreme Court said during the Civil War that if tribunals are ever appropriate, it is up to Congress to define how and when they are to be used.[6]

It is absolutely inappropriate to rely on the broad domestic concept of conspiracy – a concept that arises against a vibrant backdrop of individual rights – and apply it in this commission. Consider, in total, the Prosecution's claims in these motions: the Constitution does not apply, treaties cannot protect individuals, Mr. Hamdan has no rights at all, the mere say-so of the Executive is enough to breathe life into military commissions, the Executive can hand-pick the judges, the Commissions can depart flagrantly from military law, and the like. None of that is true in the civilian context, and that is why the Prosecutor's civilian cases, as well as the very Article by undersigned defense counsel that he cites, cut exactly the other way.

Moreover, international law conspiracy doctrine, to the extent it exists independently, is limited to cases of top-level actors perpetrating crime against humanity or genocide. Given this understanding, the Prosecution's reliance on domestic conspiracy case law (as well as the domestic rationale for strongly enforcing conspiracy law) is completely inapt. *See* Prosecution Response to Defense Motion To Dismiss at 5. Defining the contours and elements of conspiracy charges, which has been repeatedly limited and confined in the international context, to the robust role it plays in the domestic sphere illustrates the Government's misunderstanding of both international law and the justifications for robust enforcement of domestic law. Of course, it is not surprising that the Government relies on domestic cases in delineating what it hopes will be the contours of the conspiracy offense for Mr. Hamdan, as the paucity of international precedent on the issue would leave them with no authority to cite.

Undersigned counsel is probably the leading proponent of an aggressive prosecutorial approach to conspiracy law in the civilian courts, but that has nothing to do with the laws of war, for the reasons stated in the very Article quoted by the Prosecutor. It is Congress' responsibility

[6] Undersigned counsel wrote the *Legal Affairs* Article prior to having any involvement with the Office of Military Commissions. At the time of the above-mentioned *Slate* Magazine Article, Undersigned Counsel had, *pro bono*, served as Counsel of Record for the Military Attorneys Assigned to the Defense in the Office of Military Commissions in the U.S. Supreme Court *Rasul* case. Subsequent to publishing that Slate Magazine Article, he filed a challenge in federal court on behalf of Lt. Commander Swift.

to define the laws of war, and it has refused to override the international law's distrust of conspiracy law- especially in the context of minor actors engaged in non-genocidal activities. It is well outside of the scope of the Executive's power to override this Congressional decision by changing the laws of war to prosecute Mr. Hamdan in front of a military commission on this charge. If the Prosecutor is misreading the cases in the same way that he is misreading the undersigned counsel's academic work, then our problems have only begun.

As a result, this court should dismiss for failure to state an offense within the subject matter jurisdiction of a military commission.

5. Files Attached. None.

6. Oral Argument. The Defense position remains the same, please see D17.

7. Legal Authority Cited.

a. 10 U.S.C. § 821

b. 10 U.S.C. § 904

c. 10 U.S.C. § 906

d. U.S. Const. art. I, § 8, cl. 10

e. 18 U.S.C. § 2441

f. MCI No. 2 para. 3(B)

g. Ex Parte Quirin, 317 U.S 1 (1942)

h. In re Yamashita, 327 U.S. 1 (1946)

i. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003)

j. Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956)

k. Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001)

l. 18 U.S.C. 371 Public L. No. 107-40, 115 Stat. 224

m. Hamdi v. Rumsfeld 124 S. Ct. 2633 (2004)

n. Michael P. Scharf, *The International Trial of Slobodon Milosevic: Real Justice or Realpolitik?*, 8 ILSA J. Int'l & Comp. L. 389 (2002)

o. Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 Minn. L. Rev. 30 (2003)

p. Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 Mil. L. Rev. 275 (1995)

q. Amnesty International, The International Criminal Court: Making the Right Choices, pt. 1, VI(D) (1997)

r. Jonathan A. Bush, Book Review, *Nuremberg: The Modern Law of War and Its Limitations*, 93 Colum. L. Rev. 2022, 2077 (1993)

s. *Prosecutor v. Milutinovic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, IT-99-37-AR72, para. 23 (ICTY Appeals Chamber, May 21, 2003)

t. United States v. Prentiss, 206 F.3d 960 (10th Cir. 2000)

u. *Prosecutor v. Tadic*, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999)

v. *Prosecutor v. Musema*, Case No. ICTR-96-13-T, (ICTR Trial Chamber I, January 27, 2000)

w. ICTY Statute for Rwanda art. 2(3)(b), 33 I.L.M. 1602-03

x. Allison Marston Danner Constructing a Hierarchy of Crimes in International Criminal Law, 87 Va. L. Rev. 415 (2001)

y. Steven Powles, *Joint Criminal Enterprise*, 2 J. Int'l Crim. Just. 606, 613 (2004)

z. *Prosecutor v. Kvocka*, Case No: IT-98-30/1, Judgment 2 November 2001

aa. Neal Kumar Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003

bb. Neal Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1392-94 (2003)

cc. Neal Katyal, Gitmo Better Blues, Mar. 19, 2004, Slate Magazine, available at http://slate.msn.com/id/2097397/:

8. Witnesses/Evidence Required. The Defense position remains the same, please see D17.

9. Additional Information. None.

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